Supreme Court, U.S.
FILED

06-895 DEC 27 2006

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No.

IN THE

Supreme Court of the United States

ANTONIO BOSTIC, individually and in his official capacity as Deputy Sheriff for Tuscaloosa County, AL,
Petitioner

v.

LAQUARIUS GRAY, a minor, by and through her mother and next friend, Toniko L. Alexander

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether The Decision in the Court Below Misinterprets *TLO* and Ignores the Clear Precedent Established by this Court in *Whren* and Other Decisions.

B. Whether The Court of Appeals Decision Completely Ignores this Court's Decisions in *Whren, Graham v. Connor, Davenpeck v. Alford* and Others.

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CONSTITUTIONAL PROVISIONS

4TH AMENDMENT 1

Petitioner Tuscaloosa County, Alabama Deputy Sheriff Antonio Bostic ("Deputy Bostic") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Gray Ex Rel. Alexander v. Bostic*, ____ F.3d 3461 (11th Cir. 2006). It is reproduced in the Appendix at App. 1a. The opinion of the District Court denying petitioner's motion for summary judgment is unreported and is reproduced in the Appendix at App. (26a). The denial of the Petition for Rehearing En Banc by the Court of Appeals is reproduced in the Appendix at App. (27a).

JURISDICTION

The Court of Appeals judgment was entered on August 7, 2006. A timely petition for rehearing en banc was denied on September 29, 2006. Appendix at App. (27a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(i).

RELEVANT PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides that: "The right of the people to be secure in their persons... against unreasonable searches and seizures...".

STATEMENT

Petitioner seeks review of the ruling of the Eleventh Circuit Court of Appeals which held that in a school setting a determination of the existence of probable cause in the qualified immunity analysis of an illegal seizure claim is not necessary under *New Jersey v. TLO*, 469 U.S. 325 (1985), despite Deputy Bostic's argument that probable cause existed to seize Respondent Laquarius Gray ("Gray"). Further, the Court below used the subjective motivations of the deputy to find the seizure unreasonable under the two-part "reasonableness" test announced in *TLO*. The Court of Appeals stripped Deputy Bostic of qualified immunity by refusing to examine the existence of probable cause or arguable probable cause and, instead applied only a "reasonableness" test to the seizure. Despite numerous rulings by this Court that clearly remove the subjective motivations of the law officer from the analysis, the seizure was held constitutionally unreasonable under *TLO* by the lower Court because Deputy Bostic allegedly intended to "punish" Gray by seizing her. The fact Gray admits to making a misdemeanor threat to physically assault her teacher is considered a pretext by Deputy Bostic to excuse his evil intentions or "purely punitive purposes".

Petitioner seeks review of the Eleventh Circuit's ruling because it is in conflict with the rulings of this Court in *Whren v. United States*, 517 U.S. 806 (1996), *Arkansas v. Sullivan*, 532 U.S. 769, *Graham v. Connor*, 490 U.S. 386 (1989), *Davenpeck v. Alford*, 543 U.S. 146 (2004), *New Jersey v. TLO*, 469 U.S. 325 (1985), *Terry v. Ohio*, 392 U.S. 1 (1968) and others. It is also in conflict with several other rulings of the Eleventh Circuit as

well as other circuit courts of appeals that do not skip over a determination of the existence of probable cause when analyzing an illegal seizure under a qualified immunity defense and, do not allow constitutional reasonableness to depend on the subjective motivations of the individual officer. See, e.g., *Shuman v. Penn Manor School District*, 422 F.3d 141 (3rd Cir. 2005); *Lee v. Ferraro*, 284 F.3d 1188, 1198 n. 7 (11th Cir. 2002); *United States v. Villagrana-Flores*, 467 F.3d 1269 (10th Cir. 2006); *United States v. Sledge*, 460 F.3d 963 (8th Cir. 2006); *United States v. Hines*, 449 F.3d 809 (7th Cir. 2006).

The petition arises out of a civil rights action brought by Toniko L. Alexander ("Alexander") as parent and next friend of Gray following the seizure of Gray at her elementary school by Deputy Bostic, a school resource officer ("SRO"). The facts were undisputed. On March 7, 2003, Gray's P.E. Coach believed Gray was not doing "jumping jacks" along with the rest of the physical education class. Gray was told to do her exercises and, when she failed to do so, she was ordered to come to the front of the class and stand against the wall. However, before complying with that instruction, Gray threatened to physically harm her P.E. Coach.

Deputy Bostic witnessed the exchange between Gray and her coach. He was on duty at Gray's school as a SRO working for the Tuscaloosa County Sheriff's Office. Before Gray could be dealt with by one of her P.E. Coaches, Deputy Bostic intervened and ordered Gray to come to him. Deputy Bostic escorted Gray out of the gym and into a lobby area where no one else was present. He asked Gray to turn around and, when she

did, he handcuffed her. Deputy Bostic told Gray, "This is how it feels when you break the law. This is how it feels to be in jail." Gray began sobbing. Deputy Bostic testified through interrogatories that he was of the opinion that Gray had committed a misdemeanor in his presence and, he arrested her to impress upon her the serious nature of committing crimes that can lead to arrest or incarceration. After Gray's continued sobbing, Deputy Bostic decided not to "book" Gray under formal charges and released her. Gray returned to her P.E. Coaches' office.

On November 4, 2003, by and through Alexander, Gray sued Deputy Bostic and Tuscaloosa County Sheriff Edmund M. "Ted" Sexton ("Sexton") in their official and individual capacities for several claims of civil rights violations as well as state law claims and, injunctive relief against Sexton. Defendants Bostic and Sexton filed a motion to dismiss with the district court which was granted. Gray appealed this ruling to the Eleventh Circuit Court of Appeals on the dismissal of her Fourth Amendment claims against the Defendants individually. The Eleventh Circuit reversed the district court as to the Fourth Amendment claims and remanded the case for further proceedings.

After discovery, both defendants moved for summary judgment based on qualified immunity in the district court. The district court denied summary judgment for both Defendants and, both timely appealed that denial of qualified immunity to the Eleventh Circuit. On August 7, 2006, the Eleventh Circuit upheld the District Court's ruling as to Deputy Bostic but reversed the denial of qualified immunity as to Defendant Sexton.

The Eleventh Circuit found that *New Jersey v. T.L.O.* does not require a determination of the existence of probable cause relating to a seizure, if the seizure occurs in a school setting. As such, it held that *TLO* did not require the Court to reach the issue of whether Deputy Bostic had probable cause or arguable probable cause to seize Gray. Instead, the Eleventh Circuit held that only a two-part "reasonableness" test as outlined in *TLO* for school searches should be applied to determine if Deputy Bostic was entitled to qualified immunity. The Court below, after applying the *TLO* test for school searches, created by this Court for searches lacking probable cause, held that Deputy Bostic's subjectively evil intentions rendered the seizure unreasonable. The Eleventh Circuit subsequently denied a petition for rehearing en banc filed by Petitioner.

REASONS FOR GRANTING OF THE PETITION

A. The Decision in the Court Below Misinterprets *TLO* and Ignores the Clear Precedent Established by this Court in *Whren* and Other Decisions

The Eleventh Circuit's decision constitutes a complete misreading of this Court's rulings in *New Jersey v. T.L.O.* and *Terry v. Ohio* as well as *Whren v. United States*, 517 U.S. 806 (1996). The Eleventh Circuit correctly points out that in *T.L.O.*, this Court recognized that the substantial need to maintain discipline in the classroom and foster a positive learning environment "requires some modification of the level of suspicion of illicit activity needed to justify a search" in a public school setting. *Id.* At 340. However, what the

lower court's decision plainly ignores is that the two-part "reasonableness" test created in *T.L.O.*, was an analysis only made necessary by the absence of probable cause. In other words a lack of probable cause to conduct a search in a public school did not necessarily strip government actors of their qualified immunity if, instead, the search, under all the circumstances, was reasonable under the two-part test. *Id.* at 341. Ordinarily, a search – even one that may permissibly be carried out without a warrant – must be based upon probable cause to believe that a violation of the law has occurred. However, "probable cause" is not an irreducible requirement of a valid search. *Id.* at 340.

What the Eleventh Circuit's decision ignores or misinterprets is that neither *T.L.O.* nor *Terry* changed the long held precept that under the Fourth Amendment, probable cause justifies a seizure. *Beck v. Ohio*, 379 U.S. 89 (1964); *Whren*, supra. As this Court wrote over forty years ago; probable cause for a warrantless arrest "depends... upon whether, at the moment the arrest was made, ... the facts and circumstances within [the arresting officer's] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." *Beck* at 91. This Court's decision in *TLO* expanded the realm of permissible searches under the Constitution beyond those conducted only with a warrant or probable cause; it did not narrow that realm to remove probable cause as justification for a Fourth Amendment search or seizure simply because the location of a search or seizure was in a public school.

The decision of the Court below acknowledges that Deputy Bostic testified through sworn answers to interrogatories that he seized Gray because she had committed a misdemeanor in his presence. Yet, instead of determining if Deputy Bostic was aware of facts and circumstances that would suggest to a prudent man that an offense was committed or about to be committed, such as a verbal threat of assault from a student to her teacher, the Court omitted such a determination, skipping straight to the two-part "reasonableness" test for school searches, absent probable cause, announced in *TLO*. Perhaps this suggests that the Eleventh Circuit quickly determined an absence of probable cause or arguable probable cause and, simply saved all parties time by moving directly to the *TLO* reasonableness test. Yet, this conclusion is forbidden by the lower Court's own comments in footnote 7 explaining the belief that this Court's holding in *T.L.O.* mandates the qualified immunity analysis *begin* with the two-part "reasonableness" test in *TLO* because the setting is a public school and reach the issue of probable cause only if necessary. Consequently, the lower Court's refusal to determine the existence of probable cause or arguable probable cause allowed the Eleventh Circuit to wrongfully strip Deputy Bostic of his qualified immunity.

Whren and other prior decisions of this Court clearly indicate that if probable cause exists to make the seizure, the inquiry into its constitutionality ends and, no further analysis is needed. The Court below refused to determine if Deputy Bostic had probable cause to seize Gray under any of the myriad Alabama criminal statutes provided in his argument. In short,

the decision of the Eleventh Circuit ignores and misinterprets the precedent of this Court and reaches the untenable conclusion that *TLO's* holding narrows, rather than expands, the scope of permissible conduct under the Fourth Amendment when in the public school setting.

B. The Court of Appeals Decision Completely Ignores this Court's Decisions in *Whren, Graham v. Connor, Davenpeck v. Alford* and Others

In *Whren*, this Court stated, "Not only have we never held... that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." *Id.* at 811. The decision of the Court below takes the position that Deputy Bostic was attempting to "punish" Gray. Because his seizure of Gray is classified as an "investigatory stop" rather than an "arrest" and, since counsel for Gray never performed any discovery in the case other than sending Deputy Bostic some interrogatories, the Court of Appeals determined that no evidence existed that Bostic handcuffed Gray for any other reason than to "punish" her. The Circuit Court's decision states Deputy Bostic's sole purpose in handcuffing Gray was "to punish her *and* teach her a lesson." Interestingly, this conclusion is assumed by the Eleventh Circuit panel from a "lack" of any evidence to the contrary.

In *Graham v. Connor*, 490 U.S. 386, 397 (1989) this Court wrote, "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's

good intentions make an objectively unreasonable use of force constitutional." Again in *Whren* this Court held, "Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Id.* at 813. See, also, *Arkansas v. Sullivan*, 532 U.S. 769 (2001).

Here there is no question that Deputy Bostic was objectively justified in detaining and handcuffing Gray, subjective intentions notwithstanding, in light of her threat to physically assault her P.E. Coach. As Justice Scalia stated in *Davenpeck v. Alford*, 543 U.S. 146 (2004), "In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." The Eleventh Circuit's decision fails to ever perform this analysis. Instead, the Court below found that Deputy Bostic's motivation for seizing Gray was "to punish her and teach her a lesson" and that "every reasonable officer would have known that handcuffing a compliant nine-year-old girl for purely punitive purposes is unreasonable."

As this Court held in *Florida v. Jimeno*, 500 U.S. 249 (1941), the touchstone of the Fourth Amendment is reasonableness. However, Fourth Amendment reasonableness is not determined as the Court below determined the reasonableness of Deputy Bostic's seizure, by the subjective motivations of the law officer.

Instead, reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances. *Id.* Moreover, in *Davenpeck*, Justice Scalia wrote,

> "Our cases make clear that an arresting officer's state of mind (except for the facts he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. The Fourth Amendment's concern with reasonableness allows certain actions to be taken in certain circumstances, *whatever* the subjective intent. Evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." (Citations and quotations omitted).

Id. at 153. In short, the Eleventh Circuit failed to view Gray's seizure objectively. The criminal laws of the State of Alabama are to be objectively applied to its citizens regardless of age, sex, race or current educational level. The Court below refused to objectively view Gray's seizure because she is a nine-year-old, female, elementary school student. Had Deputy Bostic seized a grown man outside a night club who threatened to assault another person in his presence, he would have acted reasonably under the Fourth Amendment in the eyes of the Eleventh Circuit in doing so. Yet, the specific facts involved in this case do not allow the analysis to be so easily amputated from the perceived subjective motivations of Deputy Bostic.

Namely, the fact that the seizure was of someone who is recognized as a smaller, weaker individual made Deputy Bostic appear as an obvious bully. Still, the only analysis of Gray's seizure under the Fourth Amendment *must be* an objective one. In the Court below, it was not.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

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(any footnotes trail end of each document)
No. 06-10216 Non-Argument Calendar
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LAQUARIUS GRAY, a minor, by and through her mother and next friend, Toniko L. Alexander,
Plaintiff-Appellee,

Versus

ANTONIO BOSTIC, individually and in his official capacity as Deputy Sheriff for Tuscaloosa County, AL, EDMUND SEXTON, individually and in his official capacity as Principal of Holt Elementary School, Tuscaloosa, AL,
Defendants-Appellants,

JOYCE SELLERS, individually and in her official capacity as Superintendent of Tuscaloosa County, AL, School System and/or Tuscaloosa County, AL, Board of Education, et al.,
Defendants.

August 7, 2006, Decided

COUNSEL: For Antonio Bostic, Appellant: Travis Russell Wisdom, Hubbard, Smith, McIlwain, Brakefield & Browder, P.C., TUSCALOOSA, AL.

For Edmund Sexton, Appellant: Robert McCollough Spence, Hubbard, Smith, Mc Ilwain, Breakfield & Browder, TUSCALOOSA, AL.

For Laquarius Gray, Appellee: Thomas Blake Liveoak,

Collins, Liveoak & Boyles, P.C., BIRMINGHAM, AL.

JUDGES: Before CARNES, HULL and PRYOR, Circuit Judges.

OPINION BY: HULL

OPINION: HULL, Circuit Judge:

This is the second appeal involving the detention and handcuffing of a nine-year-old student, Laquarius Gray, during her physical education class. The first time, we reversed the district court's Rule 12(b)(6) dismissal of this § 1983 action. *Gray v. Bostic, 127 Fed. Appx. 472 (11th Cir. 2004).* This time, the defendants appeal the district court's denial of their motions for summary judgment based on qualified immunity. After review, we affirm in part and reverse in part.

I. BACKGROUND

A. The Incident

Coach Lattuce Greer Williams believed that Gray was not doing "jumping jacks" along with the rest of the physical education class. Coach Williams told Gray she needed to do her exercises. When Gray failed to comply, Coach Williams told Gray to "[c]ome to the wall" of the gym. Williams testified that as Gray walked to the wall, "[s]he told me that she would punch me or hit me, hit me in the face." A nearby teacher, Coach Tara Horton, witnessed the disagreement with Coach Williams. Coach Horton testified that Gray said, "I bust you in the head," which Coach Horton explained meant that "she was going to hit him in the head." Although Coach Williams and Coach Horton attribute slightly

different language to Gray, the gist of their testimony is that Gray threatened to hit Coach Williams.

In contrast, Gray testified that she did not threaten to "bust" Coach Williams in the head. Although Gray could not remember what she said, she agreed that she threatened to "do something" to Coach Williams and that what she said was disrespectful, as follows:

> Q: Then, [Coach Williams] told me that, at that point, you told him that you were going to bust him in his head; is that right?
>
> A: No, sir.
>
> Q: You didn't say that?
>
> A: No, sir.
>
> Q: Is Coach Williams lying to me?
>
> MR. LIVEOAK: Objection
>
> Q: (By Mr. Wisdom) You can answer. Is Coach Williams telling me a lie?
>
> A: I guess he did. I don't remember what I said, but I didn't say that.
>
> Q: You don't remember what you said?
>
> A: (Witness shakes head.)
>
> Q. You don't have any idea what you said?
>
> MR. LIVEOAK: Is that no?
>
> A: No.

Q: (By Mr. Wisdom) So, you don't know if you said that you might punch him; is that right: Did you say something to him that was disrespectful?

A: Yes, sir.

Q: What was that?

A. I don't remember.

Q. Did you tell him that you might do something to him?

A. Yes, sir.

...

Q: What did you tell him that you were going to do to him?

A. I don't remember.[1]

Because of the summary judgment posture of the case, we construe Gray's testimony as denying the coaches' version of what she said. However, Gray does not dispute that she threatened to "do something" physically to Coach Williams. Thus the precise nature of her physical threat – whether it was to hit him in the face, poke him in the eye or kick him in the shins – does not change our analysis.

After hearing Gray's threat to Coach Williams, Coach Horton instructed Gray to come over to her. Coach Williams then turned his attention back to his class.

Deputy Antonio Bostic also witnessed the exchange between Gray and Coach Williams. Deputy Bostic was employed as a Tuscaloosa County Sheriff's Deputy and

served as a school resource officer ("SRO") for several schools, including Holt Elementary. Before Gray reached Coach Horton, Deputy Bostic intervened and told Coach Horton that he would talk to Gray. Coach Horton insisted that she would handle the matter. However, Deputy Bostic insisted that he would handle Gray and escorted Gray out the gym door into a lobby area.

Deputy Bostic told Gray to turn around, pulled her hands behind her back and put Gray in handcuffs. Deputy Bostic tightened the handcuffs to the point that they caused Gray pain. Deputy Bostic told Gray, "[T]his is how it feels when you break the law," and "[T]his is how it feels to be in jail." Gray began to cry. Gray stood with the handcuffs on for not less than five minutes, with Deputy Bostic standing behind her.[2]

In discovery responses, Deputy Bostic averred that he detained and handcuffed Gray "to impress upon her the serious nature of committing crimes that can lead to arrest, detention or incarceration" and "to help persuade her to rid herself of her disrespectful attitude." Deputy Bostic's discovery responses also stated that he "did not feel the need to apologize to LaQuarius Gray for telling her that she committed a misdemeanor in my presence and showing her what would happen if a less generous officer than I were to arrest her for her actions."[3] After Deputy Bostic took the handcuffs off, Gray went to the Coaches' Office until her next class.

Neither Coach Horton nor Coach Williams was afraid of Gray or believed that Gray would actually carry out her threat. When asked whether he was "ever afraid that

[Gray] would commit an act of violence towards [him] or Ms. Horton," Coach Williams replied, "No, sir." Similarly, Coach Horton replied "No,' when asked if she was "ever afraid that Ms. Gray would physically assault you or another student?" When asked, "[W]hen Ms. Gray told Coach Williams that she was going to bust him in the head she's not actually physically capable of doing that, is she," Coach Horton agreed. Coach Horton planned to talk with Gray about the incident and give her a warning. Coach Horton testified that she would not have been required to write Gray up, give Gray detention, or send her to the principal's office "because it wasn't that major."

B. Court Proceedings

On November 4, 2003, by and through her mother, Gray filed suit against Deputy Bostic and Tuscaloosa County Sheriff, Edmund Sexton in their official and individual capacities.[4] Gray's complaint contained eight counts, including claims: (1) under 42 U.S.C. § 1983 for violations of Gray's First, Fourth, Fifth, Eighth and Fourteenth Amendment rights (Count 1); (2) under 42 U.S.C. § 1981 for race discrimination (Count 2); and (3) under state law for invasion of privacy, assault and battery, false imprisonment, defamation and intentional infliction of emotional distress (Counts 4 through 8). Gray also sought declaratory and injunctive relief (Count 3). The defendants filed a motion to dismiss, which the district court granted.

Gray appealed to this Court, challenging only the district court's dismissal of her Fourth Amendment claims against Deputy Bostic and Sheriff Sexton individually and the denial of her motion for leave to amend her complaint.[5] We reversed, stating that on

remand Gray was entitled to pursue her Fourth Amendment claims against defendants Deputy Bostic and Sheriff Sexton individually and to file an amended complaint. Gray, 127 Fed. Appx. 472, slip op. at 22. The district court ordered Gray to file an amended complaint asserting only the Fourth Amendment claims that remained following her appeal. Gray then amended her complaint, asserting claims of excessive use of force and unreasonable seizure against defendants Bostic and Sexton individually.

Following discovery, the defendants moved for summary judgment based on qualified immunity. The district court denied the motion, prompting this interlocutory appeal.

II. STANDARD OF REVIEW

Although the denial of summary judgment generally is not a final appealable order subject to immediate appeal, an interlocutory appeal may be taken where the district court denies the defense of qualified immunity and the appeal involves a question of law. *McMillian v. Johnson, 88 F.3d 1554, 1563,* amended on other grounds, 101 F.3d 1363 (11th Cir. 1996). We review de novo a district court's denial of summary judgment based on qualified immunity, viewing the evidence in a light most favorable to the opposing party. *Williams v. Consol. City of Jacksonville, 341 F.3d 1261, 1266-67 (11th Cir. 2003).*

III. DISCUSSION

A. Qualified Immunity Principles

"Qualified immunity offers a complete protection for government officials sued in their individual capacities

if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Vinyard v. Wilson, 311 F.3d 1340, 1346 (11th Cir. 2002)* (quoting *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)*. To be entitled to qualified immunity, the defendant must prove that he was acting within the scope of his discretionary authority. Id. "Once the defendants establish that they were acting within their discretionary authority, the burden shifts to the plaintiff to demonstrate that qualified immunity is not appropriate." *Lumley v. City of Dade City, 327 F.3d 1186, 1194 (11th Cir. 2003)*.

The Supreme Court has established a two-part test to evaluate whether an official is entitled to qualified immunity. First, as a threshold inquiry, we address whether the facts presented, taken in a light most favorable to the non-moving party, establish a constitutional violation. *Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001)*. If we answer this question in the affirmative, then we "ask whether the right was clearly established." Id.

B. Deputy Bostic's Discretionary Authority

Gray argues that Deputy Bostic was not acting within the scope of his discretionary authority when he detained and handcuffed Gray. "To establish that the challenged actions were within the scope of his discretionary authority, a defendant must show that those actions were (1) undertaken pursuant to the performance of his duties, and (2) within the scope of his authority." *Harbert Int'l v. James, 157 F.3d 1271, 1282 (11th Cir. 1998)*. To that end, "a court must ask whether the act complained of, if done for a proper

purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties." Id. (quotation marks omitted).

Although our prior opinion concluding that Deputy Bostic was acting within his discretionary authority was at the Rule 12(b)(6) stage and was based on merely the allegations in the complaint, there is no evidence at the summary judgment stage that changes our conclusion. Deputy Bostic as an SRO, was charged with the responsibility to investigate criminal activity that might be taking place at Holt Elementary School. As part of that responsibility, Deputy Bostic's duties included, under the right circumstances, detaining and questioning students and possibly arresting and handcuffing them. The fact that the right circumstances (for detention or handcuffing) may not have been present in this case is irrelevant to our inquiry. See id. (explaining that the "inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act" because "[f]ramed that way, the inquiry is no more than an 'untenable' tautology").

Gray stresses that SROs were not supposed to discipline students and that Deputy Bostic admitted in his interrogatory responses that his reasons for detaining and handcuffing Gray were to "impress upon her the serious nature of committing crimes that can lead to arrest, detention or incarceration" and "to help persuade her to rid herself of her disrespectful attitude." We note, however, that it is also clear from Deputy Bostic's interrogatory responses that he believed Gray had committed a misdemeanor when she threatened her teacher and that Deputy Bostic detained her to discuss the incident with her.

Therefore, we conclude that Deputy Bostic's actions were within his discretionary duties and turn to whether his actions were unconstitutional.

C. Constitutional Violations

Gray argues that Deputy Bostic used excessive force in detaining her because he lacked a right to detain her at all. Therefore, her excessive force claim is not an independent claim, but rather is subsumed in her illegal seizure claim. See *Bashir v. Rockdale County, 445 F.3d 1323, 1331 (11th Cir. 2006)* (stating that "[u]nder this Circuit's law . . . a claim that any force in an illegal stop or arrest is excessive is subsumed in the illegal stop or arrest claim and is not a discrete excessive force claim" (quotation marks omitted)).[6] Thus, our inquiry focuses on Deputy Bostic's seizure of Gray.

As stated in Gray's earlier appeal, we apply the reasonableness standard articulated in *New Jersey v. T.L.O., 469 U.S. 325, 341-42, 105 S. Ct. 733, 742-43, 83 L. Ed. 2d 720 (1985)*, to school seizures by law enforcement officers. See *Gray, 127 Fed. Appx. 472, slip op. at 14*. In T.L.O, the Supreme Court recognized that the substantial need to maintain discipline in the classroom and foster a positive learning environment "requires some modification of the level of suspicion of illicit activity needed to justify a search" in the public school setting. *Id. at 340, 105 S. Ct. at 742*. To that end, the Supreme Court concluded that "the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause." *Id. at 341, 105 S. Ct. at 742*. Instead, under T.L.O.'s reasonableness

standard, "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." Id. Under the T.L.O standard, the reasonableness of the search is evaluated using a two-step inquiry: "first, one must consider 'whether the . . . action was justified at its inception'; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified interference in the first place.'" *Id. at 341, 105 S. Ct. at 742-43* (citations omitted). The T.L.O. standard mirrors the standard announced in Terry v. Ohio governing the reasonableness of investigatory stops. See *Terry v. Ohio, 392 U.S. 1, 20, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889 (1968).*

Under T.L.O's first prong, we examine whether Deputy Bostic has a reasonable basis for calling Gray over to him, i.e., stopping her, and asking her questions. It is undisputed that Deputy Bostic witnessed Gray threaten to do something physically to her teacher. Under Alabama Code § 13A-11-8, a verbal threat, "made with the intent to carry out the threat, that would cause a reasonable person who is the target of the threat to fear for his or her safety," constitutes the crime of harassment, which is a Class C misdemeanor. See Ala. Code § 13A-11-8(a)(1)-(3). Gray stresses neither Coach Williams nor Coach Horton feared for their safety and that Deputy Bostic had no probable cause or arguable probable cause to arrest her. However, under T.L.O., the level of suspicion in a school setting needed to justify a search or an investigatory stop is only reasonableness under the circumstances. Given his having witnessed Gray's threat in a school setting, Deputy Bostic's stopping

Gray to question her about her conduct was reasonable.[7]

Turning to T.L.O's second prong, we must consider whether Deputy Bostic's subsequent handcuffing of Gray "was reasonably related to the scope of the circumstances which justified the interference in the first place." *Id. at 341, 105 S. Ct. at 743* (quotation marks omitted and emphasis supplied). "[A seizure] will be permissible in its scope when the measures adopted are reasonably related to the objectives of the [seizure] and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." T.L.O., 469 U.S. at 342, 105 S. Ct. at 743. After stopping Gray, Deputy Bostic not only questioned her, but also handcuffed her for not less than five minutes. Thus, the question under the second prong is whether the handcuffing of nine-year-old Gray was reasonably related to the scope of the circumstances which justified Deputy Bostic's initial interference and was not excessively intrusive.

By his own admission, Deputy Bostic did not handcuff Gray to effect an arrest of Gray. Rather, his handcuffing of Gray was during an investigatory stop. Nonetheless, during an investigatory stop, an officer can still handcuff a detainee when the officer reasonably believes that the detainee presents a potential threat to safety. *See United States v. Hastamorir, 881 F.2d 1551, 1557 (11th Cir. 1989); United States v. Blackman, 66 F.3d 1572, 1576-77 (11th Cir. 1995); United States v. Kapperman, 764 F.2d 786, 790-91 & n.4 (11th Cir. 1985).*

The problem in this case for Deputy Bostic is that, at

the time Deputy Bostic handcuffed Gray, there was no indication of a potential threat to anyone's safety. The incident was over, and Gray, after making the comment, had promptly complied with her teachers' instructions, coming to the gym wall and then to Coach Horton when told to do so. There is no evidence that Gray was gesturing or engaging in any further disruptive behavior. Rather, Gray had cooperated with her teachers and did not pose a threat to anyone's safety. In fact, Coach Horton had insisted that she would handle the matter, but Deputy Bostic still intervened. Deputy Bostic does not even claim that he handcuffed Gray to protect his or anyone's safety. Rather, Deputy Bostic candidly admitted that he handcuffed Gray to persuade her to get rid of her disrespectful attitude and to impress upon her the serious nature of committing crimes. In effect, Deputy Bostic's handcuffing of Gray was his attempt to punish Gray in order to change her behavior in the future.

Thus, Deputy Bostic's handcuffing Gray was not reasonably related to the scope of the circumstances that justified the initial investigatory stop. Rather, the handcuffing was excessively intrusive given Gray's young age and the fact that it was not done to protect anyone's safety. Therefore, the handcuffing of Gray violated Gray's Fourth Amendment rights.

2. Clearly Established Law

Whether a constitutional right was "clearly established" at the time of the violation turns on "'whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Bashir, 445 F.3d at 1330* (quoting *Saucier, 533 U.S. at 202, 121 S. Ct. at 2156).* We focus on the status of the law in March

2003 when Deputy Bostic detained and handcuffed Gray.

It is well settled that, under the Fourth Amendment, "[t]he scope of a detention must be carefully tailored to its underlying justification" and that the "investigatory methods employed [during a detention] should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325-26, 75 L. Ed. 2d 229 (1983).* As we have already discussed, this Court has long concluded that it is reasonable for officers to use handcuffs to protect themselves during an investigative detention. See *Hastamorir, 881 F.2d 1551 at 1556 at 1556-57c; Kapperman, 764 F.2d at 790 n.4.* However, Gray does not cite and we cannot locate a case addressing before today when it may be reasonable to use handcuffs in an investigatory stop absent a safety rationale. Thus, no factually similar pre-existing case law put Deputy Bostic on notice that his use of handcuffs to discipline Gray was objectively unreasonable for Fourth Amendment purposes.

However, our inquiry does not end here. Even in the absence of factually similar case law, an official can have fair warning that his conduct is unconstitutional when the constitutional violation is obvious, sometimes referred to as "obvious clarity" cases. See *United States v. Lanier, 520 U.S. 259, 271, 117 S. Ct. 1219, 1227, 137 L. Ed. 2d 432 (1997)*("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] been previously held unlawful." (quotation marks omitted));

Vinyard v. Wilson, 311 F.3d 1340, 1350-51 (11th Cir. 2002).

The Fourth Amendment's general proscription against "unreasonable" seizures seldom puts officers on notice that certain conduct is unlawful under precise circumstances. *Evans v. Stephens, 407 F.3d 1272, 1283 (11th Cir. 2005)* (en banc). Nonetheless, on rare occasion we have concluded that general Fourth Amendment principles make the constitutional violation obvious. See, e.g., *Evans, 407 F.3d at 1283* (concluding that the constitutional violation was obvious where an officer conducted body cavity searches in a degrading and forceful manner and when there was no need for immediate action); *Vinyard, 311 F.3d at 1355* (concluding that the constitutional violation was obvious where the officer grabbed the arrestee by the hair and arm and applied pepper spray after she had been handcuffed and secured in the back of the patrol car); *Lee v. Ferraro, 284 F.3d 1188, 1198-99 (11th Cir. 2002)* (concluding that the constitutional violation was readily apparent where an officer slammed the arrestee's head against the trunk after she was handcuffed, secured and any risk of danger or flight had passed); *Priester v. City of Riviera Beach, 208 F.3d 919, 927 (11th Cir. 2000)* (concluding that the constitutional violation was obvious where an officer permitted his dog to attack a handcuffed, compliant arrestee for two minutes and then threatened to kill the arrestee when he kicked the dog in an effort to resist the attack). In these cases, the officer's conduct at issue lay "so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to [him] notwithstanding the lack of [fact-specific] case law." *Lee, 284 F.3d at 1199*

(internal quotation marks omitted). Put another way, the officer's conduct in these cases was "well beyond the 'hazy border' that sometimes separates lawful conduct from unlawful conduct," such that every objectively reasonable officer would have known that the conduct was unlawful. *Evans, 407 F.3d at 1283.*

We likewise conclude that Deputy Bostic's conduct in handcuffing Gray, a compliant, nine-year-old girl for the sole purpose of punishing her was an obvious violation of Gray's Fourth Amendment rights. After making the comment, Gray had complied with her teachers' and Deputy Bostic's instructions. Indeed, one of the teachers had informed Deputy Bostic that she would handle the matter. In addition, Deputy Bostic's purpose in handcuffing Gray was not to pursue an investigation to confirm or dispel his suspicions that Gray had committed a misdemeanor. Rather, Deputy Bostic's purpose in handcuffing Gray was simply to punish her and teach her a lesson. Every reasonable officer would have known that handcuffing a compliant nine-year-old child for purely punitive purposes is unreasonable. We emphasize that the Court is not saying that the use of handcuffs during an investigatory stop of a nine-year-old child is always unreasonable, but just unreasonable under the particular facts of this case.

Therefore, Deputy Bostic is not entitled to qualified immunity, and the district court properly denied summary judgment in his favor.

D. Sheriff Sexton

Gray alleges that Sheriff Sexton failed to train and supervise adequately Deputy Bostic on the proper use of force in this elementary school setting. The district

court dismissed Gray's official capacity claim against Sheriff Sexton without challenge. Thus, all that remains is her individual capacity claim against Sheriff Sexton as Deputy Bostic's supervisor.

Supervisory officials cannot be held liable under § 1983 for the unconstitutional actions of their subordinates based on respondeat superior liability. *Hartley v. Parnell, 193 F.3d 1263, 1269 (11th Cir. 1999).*[8] Instead, supervisors can be held personally liable when either (1) the supervisor personally participates in the alleged constitutional violation, or (2) there is a causal connection between the actions of the supervisor and the alleged constitutional violation. Id. Gray does not allege that Sheriff Sexton personally participated in her handcuffed detention. Thus, Gray attempts to use the second method.

Under the second method, "[t]he causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so." *Id.* (quoting *Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990)* Furthermore, to be sufficient to notify the supervisor, the deprivations must not only be widespread, they also "must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences." Id. (quoting Brown, 906 F.2d at 671).

There is no evidence in the record of widespread and obvious handcuffed detentions of students by Deputy Bostic or other deputy sheriffs. There was some vague, arguably hearsay testimony by Coach Horton that she had heard that Deputy Bostic once placed another Holt Elementary student in handcuffs. However, there is no evidence that Sheriff Sexton was aware of this alleged

incident. Furthermore, this one isolated incident, of which there are no details, is not sufficient to put Sheriff Sexton on notice that Deputy Bostic needed additional training or supervision on the use of force when detaining minors.

We also recognize that Gray alleges that Sheriff Sexton instituted a policy instructing deputies to detain, handcuff, arrest and incarcerate individuals who were not suspected of committing a crime. There is no evidence in the record, however, that Sheriff Sexton instituted such a policy or any other policy that would have led Deputy Bostic to believe that he could detain a student in handcuffs absent safety concerns.

Finally, Gray emphasizes that Deputy Bostic received no training specifically addressing the detention of students. She contends that Sheriff Sexton should have foreseen that unwarranted handcuffed detentions of students were "bound to happen" without such training. Thus, Gray is arguing that the need to train was "so obvious" that the failure to do so constituted deliberate indifference without prior notice. See *Gold v. City of Miami, 151 F.3d 1346, 1352 (11th Cir 1998)* (addressing municipal liability for failure to train).

The Supreme Court has "hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." Id. (quoting *Bd. of County Comm'rs v. Brown, 520 U.S. 397, 409, 117 S. Ct. 1382, 1391, 137 L. Ed. 2d 626 (1997)*. However, the Supreme Court's only example of an obvious training need was the use of deadly force when police officers are given firearms. We have already determined that the need for

training regarding the proper use of handcuffs is "'[u]nlike the risk from a particular glaring omission in a training regimen,'" and is instead a risk from a "possible imperfection[], . . . in . . . training and supervision" that is "'not obvious in the abstract.'" *Id. at 1352* (quoting in part *Brown, 520 U.S. at 409, 117 S. Ct. at 1391).*

We similarly conclude that the need for training regarding the detention of students specifically is not obvious in the abstract and that a lack of such training is a "possible imperfection," but not a "glaring omission" from a training regimen. Deputy Bostic received training, at both the police academy and the Tuscaloosa County Sheriff's Department, on the proper use of force and the principles of probable cause. The failure to provide specific training regarding the detention of students, in addition to general training regarding use of force during detention and 22 arrest, was not "so likely" to result in the violation of students' Fourth Amendment rights that Sheriff Sexton reasonably can be said to have been deliberately indifferent to the need for this particularized training without any prior notice. See *City of Canton v. Harris, 489 U.S. 378, 390-92, 109 S. Ct. 1197, 1205-07, 103 L. Ed. 2d 412 (1989)* (finding no obvious need to train jail supervisors regarding when to provide medical treatment beyond first aid); *Gold, 151 F.3d at 1352; Young v. City of Augusta, 59 F.3d 1160, 1172 (11th Cir. 1995)* (finding no obvious need to train jailers regarding medical treatment for mental illnesses and dispensing of prescribed medication).[9] Accordingly, Sheriff Sexton was entitled to summary judgment in his individual capacity.

E. Injunctive Relief

Defendants also argue that the district court erred in

failing to grant summary judgment on Gray's claim for injunctive relief against Sheriff Sexton.[10] Specifically, Gray's injunctive relief claim seeks a declaration that Sheriff Sexton's custom or policy of failing to train deputies on the detention of students is unconstitutional and seeks to enjoin Sheriff Sexton from continuing to implement that custom or policy. However, there is no evidence of an unconstitutional policy or custom implemented by Sheriff Sexton. Therefore, Gray's claim for injunctive relief against Sheriff Sexton also necessarily fails. Accordingly, Sheriff Sexton is entitled to summary judgment on Gray's claim for injunctive relief.

III. CONCLUSION

For the forgoing reasons, we affirm the district court's denial of summary judgment on Gray's illegal seizure claim against Deputy Bostic in his individual capacity, reverse the district court's denial of summary judgment on Gray's claims against Sheriff Sexton and on her separate excessive force claim against Deputy Bostic, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMAND.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 In the first appeal of the Rule 12(b)(6) dismissal, we reviewed the allegations in the complaint, which stated only that Gray made a "disrespectful comment" to Coach Williams. We noted that at the Rule 12(b)(6) juncture, there was no allegation of profanity or

fighting words or that Gray was a danger to any teacher or student. *Gray*, 127 Fed. Appx. 472, slip op. at 14, 17. Now, at the summary judgment juncture, we have deposition testimony as to what was said and the context in which it was said.

n2 There is a factual dispute about how long Gray was in handcuffs. As to time, Gray testified that she did not know how long she stood in handcuffs. However, Gray was asked whether it was "less than five minutes," and replied "No, sir." When Coach Horton was asked how long Gray was in handcuffs, she responded, "I'm going to guesstimate two minutes maybe." Deputy Bostic averred that he "detained [Gray] for less than 30 seconds . . . ." At the summary judgment stage, however, we must review the evidence in a light most favorable to Gray and assume that Gray was handcuffed for not less than five minutes.

n3 Deputy Bostic was never deposed and did not file a declaration in support of his motion for summary judgment. Therefore, the only sworn statement from Deputy Bostic relating to the events is contained in his interrogatory responses.

n4 Gray's original complaint also alleged claims against Joyce Harris, Holt Elementary School's principal; Joyce Sellers, the Tuscaloosa County School Superintendent; and members of the Tuscaloosa County Board of Education. Gray subsequently dismissed these claims.

n5 In the prior appeal, Gray did not challenge the dismissal of her First, Fifth, Eighth and Fourteenth Amendment claims, her state law claims or her official capacity claims against Deputy Bostic and Sheriff Sexton.

n6 Although Gray alleges that Deputy Bostic tightened the handcuffs enough to cause her pain, she has not argued that the handcuffing constituted excessive force even if Deputy Bostic's stop was supported by reasonable suspicion.

n7 Although defendants claim Deputy Bostic had probable cause, the conduct in § 13A-11-8 cases has been generally more egregious and has involved a credible threat. See, e.g., *B.B. v. State, 863 So. 2d 132, 135-36 (Ala. Crim. App. 2003)* (holding that a disruptive seventh grade student who threatened to kill his teacher violated § 13A-11-8 where the student was very angry during the incident, uttered the threat through clenched teeth and threw a desk across the room while stating, "I hate that teacher, I hate that teacher," and the teacher and another witness both testified that they feared the student would harm the teacher); *Fallin v. City of Huntsville, 865 So. 2d 473, 477 (Ala. Crim. App. 2003)* (concluding that defendant violated § 13A-11-8 where defendant, a large man, was yelling threats to his daughter's cheerleading coach while approaching her with waiving arms and pointing fingers and the coach and other witnesses testified that they were afraid for their safety).

However, because T.L.O. does not require probable cause in a school setting, we need not reach the issue of whether Deputy Bostic had probable cause or arguable probable cause. See *Durruthy v. Pastor, 351 F.3d 1080, 1089 (11th Cir. 2003)* (explaining that a showing of only arguable probable cause is required to establish that an officer is entitled to qualified immunity).

n8 For this reason, we reject Gray's argument that Sheriff Sexton can be held liable because, under Alabama law, a deputy sheriff is the agent and alter ego of the sheriff. To hold Sheriff Sexton liable for Deputy Bostic's alleged constitutional violation under an alter ego theory would amount to respondeat superior liability.

n9 Gray cites no case law or statute that required Sheriff Sexton to train SROs, such as Deputy Bostic, on how to detain students. Therefore, the law was not "clearly established" for purposes of qualified immunity such that a reasonable official in Sheriff Sexton's shoes would have known that the failure to provide such training constituted deliberate indifference. See *Riley v. Newton, 94 F.3d 632, 637 (11th Cir. 1996)* (concluding that sheriff was entitled to qualified immunity on failure-to-train claim where plaintiffs failed to cite case law or constitutional provision requiring sheriff to provide training on how to use Army personnel and rejecting plaintiffs' argument that City of Canton's general standard of liability in failure to train cases clearly established the right).

n10 Generally, the denial of summary judgment on a claim for injunctive relief is not a final appealable decision. *Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 25, 87 S. Ct. 193, 195, 17 L. Ed. 2d 23 (1966).* However, "[u]nder the pendant appellate jurisdiction doctrine, we may address [otherwise] nonappealable orders if they are 'inextricably intertwined' with an appealable decision." *Hudson v. Hall, 231 F.3d 1289, 1294 (11th Cir. 2000)* (quotation marks omitted). Here, Gray's claim for injunctive relief and Sheriff Sexton's argument that he

is entitled to qualified immunity are inextricably intertwined because both turn on whether Sheriff Sexton has implemented an unconstitutional policy or custom. See *Moniz v. City of Fort Lauderdale, 145 F.3d 1278, 1281 n.3 (11th Cir. 1998)* (concluding that the issues are inextricably intertwined when the court, in resolving the qualified immunity issue, also reaches the merits of the pendant claim).

No. 03-02989-CV-UWC-W.
United States District Court
for the Northern District of Alabama

LAQUARIUS GRAY, a minor, by and through her mother and next friend, Toniko L. Alexander,
Plaintiff

Versus

ANTONIO BOSTIC, individually and in his official capacity as Deputy Sheriff for Tuscaloosa County, AL, EDMUND SEXTON, individually and in his official capacity as Principal of Holt Elementary School, Tuscaloosa, AL,
Defendants

JOYCE SELLERS, individually and in her official capacity as Superintendent of Tuscaloosa County, AL, School System and/or Tuscaloosa County, AL, Board of Education, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Discovery in this case has not resulted in a version of facts substantially different from those set forth in the Eleventh Circuit's opinion reversing this Court's grant of summary judgment to the Defendants.

Viewing the facts and the reasonable inferences flowing therefrom in a light most favorable to the Plaintiff, summary motion for summary judgment is hereby DENIED.

Done this 12th day of December, 2005.

Filed: 9/29/2006
No. 06-10216 Non-Argument Calendar
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LAQUARIUS GRAY, a minor, by and through her mother and next friend, Toniko L. Alexander,
Plaintiff-Appellee,

Versus

ANTONIO BOSTIC, individually and in his official capacity as Deputy Sheriff for Tuscaloosa County, AL,
EDMUND SEXTON, individually and in his official capacity as Principal of Holt Elementary School, Tuscaloosa, AL,
Defendants-Appellants,

JOYCE SELLERS, individually and in her official capacity as Superintendent of Tuscaloosa County, AL, School System and/or Tuscaloosa County, AL, Board of Education, et al.,
Defendants.

BEFORE: CARNES, HULL *and PRYOR, Circuit Judges.*

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC PER CURIAM:

The Petition(s) for *Rehearing are* DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

FILED
APR 17 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-895

IN THE
Supreme Court of the United States

ANTONIO BOSTIC,

Petitioner,

v.

LAQUARIUS GRAY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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April 2007

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit correctly interpreted *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and other decisions of this Court when it rejected petitioner's argument that he had probable cause to arrest a nine-year-old girl for saying she would hit her gym teacher.

2. Whether the Eleventh Circuit's passing statement that petitioner did not consider the girl to be a physical threat at the time he handcuffed her is consistent with this Court's holding in *Whren v. United States*, 517 U.S. 806 (1996), and other cases.

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Petitioner Deputy Antonio Bostic urges this Court to grant certiorari because, he contends, the Eleventh Circuit ignored his argument that he had probable cause to arrest and handcuff a nine-year-old girl for saying she would hit her gym teacher. Pet. 2. Bostic also argues that the court improperly relied on his subjectively "evil intentions" in denying his motion for summary judgment. *Id.* The court of appeals, however, made neither of the errors alleged by Bostic, and its application of established legal principles to the highly unusual facts of this case presents no issue necessitating review by this Court. Indeed, given the flagrant nature of Bostic's actions, no court could reasonably have reached any other result.

STATEMENT OF THE CASE

At the time this case arose, respondent Laquarius Gray was a nine-year-old student at Holt Elementary School in Tuscaloosa, Alabama. Pet. App. 2a. Gray's gym teacher, coach Lattuce Greer Williams, noticed that Gray was not doing her jumping jacks with the rest of the class and called her forward to stand against the wall of the gym. *Id.* Gray complied, but while doing so made a comment to Williams that she later acknowledged to be "disrespectful." *Id.* at 2a-3a. The exact nature of the comment was disputed. *Id.* at 2a-4a. Williams testified that Gray said "she would punch me or hit me, hit me in the face." *Id.* at 2a. Gray could not remember exactly what she said, but agreed that she said she would "do something" to Williams. *Id.* at 3a.

Another teacher, coach Tara Horton, overheard Gray's comment and called her over to talk, at which point Williams turned his attention back to the rest of the class. *Id.* at 4a. Horton later testified that she planned to give Gray a warning. *Id.* at 6a. She explained that she would not have been required to write Gray up, give her a detention, or send her to the principal's office because, as she put it, the incident "wasn't that major." *Id.* Both coaches testified that they were not afraid

of Gray and did not believe she would actually have hit either of them. *Id.* at 5a-6a. Indeed, Horton testified that Gray was not physically capable of hitting Williams in the face. *Id.* at 6a.

Before Gray could reach Horton, however, petitioner Deputy Antonio Bostic intervened. *Id.* at 4a. Bostic was a Tuscaloosa County Sheriff's Deputy who served as a "school resource officer" at the school. *Id.* at 4a-5a. Although Horton told Bostic that she would handle the matter, Bostic insisted on talking to Gray himself. *Id.* at 5a. Bostic escorted the girl into the lobby, where he told her to turn around, pulled her hands behind her back, and handcuffed her, tightening the handcuffs until they were painful. *Id.* Bostic then told Gray, "[t]his is how it feels when you break the law" and "[t]his is how it feels to be in jail." *Id.* Bostic left the handcuffs on for at least five minutes, while Gray sobbed. *Id.*

Gray filed suit against Bostic and other defendants on various causes of action, including a claim under 42 U.S.C. § 1983 asserting a violation of her Fourth Amendment rights. *Id.* at 6a. The district court granted defendants' motion to dismiss, but the U.S. Court of Appeals for the Eleventh Circuit reversed. *Id.* at 6a-7a. On remand, Gray filed an amended complaint asserting only her Fourth Amendment claims for excessive use of force and unreasonable seizure. *Id.* at 7a. After discovery, Bostic moved for summary judgment based on qualified immunity. *Id.* The district court denied the motion, and Bostic filed an interlocutory appeal. *Id.*

On appeal for the second time, Bostic argued that Gray's arrest was supported by probable cause because she had committed the crimes of harassment, disorderly conduct, and "terrorist threats." Ala. Code §§ 13A-10-15, 13A-11-7 & 13A-11-8(a). The court easily disposed of the probable cause issue, citing Alabama cases holding that conduct giving rise to criminal liability "has been generally more egregious and has

involved a credible threat" and noting the evidence that Gray did not pose a threat to anyone. Pet. App. 11a-12a, 22a n.7.

The court then moved to the main issue in the case—whether Bostic's conduct violated the reasonableness test established by this Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985). Pet. App. 10a-16a. *T.L.O.* established a two-step inquiry for examining a claimed Fourth Amendment violation in a school setting: "first, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified interference in the first place." *T.L.O.*, 469 U.S. at 341 (quotations omitted).

The court held that Bostic satisfied the first prong of the *T.L.O.* test because he had a reasonable basis for calling Gray over to question her about her comment. Pet. App. 11a-12a. On *T.L.O.*'s second prong, however, the court held that Bostic's decision to handcuff an elementary school student for more than five minutes was not reasonably related to the circumstances that justified Bostic's initial interference. *Id.* at 12a-13a. Considering the entirety of the record in the light most favorable to Gray, the court concluded that, "at the time Deputy Bostic handcuffed Gray, there was no indication of a potential threat to anyone's safety." *Id.* Given Gray's young age and the lack of a realistic physical threat, the court held that Bostic violated Gray's clearly established Fourth Amendment rights and thus affirmed the district court's denial of summary judgment. *Id.* Bostic then filed this petition for certiorari.

While the petition was pending, the case proceeded in the district court. The court granted judgment as a matter of law to Gray on the question of liability. At trial, the jury awarded her one dollar in nominal damages. Bostic again appealed to the Eleventh Circuit, and that appeal is pending.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit Properly Rejected Petitioner's Argument That He Had Probable Cause to Arrest Respondent.

A. The Eleventh Circuit Did Not Adopt the Rule that Petitioner Challenges.

Bostic cites no decision from any court that conflicts with the Eleventh Circuit's holding that a police officer violates *T.L.O.*'s reasonableness test by arresting a student at school when the student poses no realistic threat to anyone. Nor does Bostic dispute that the Eleventh Circuit's application of *T.L.O.* was clearly established law for purposes of qualified immunity. Instead, Bostic argues that the Eleventh Circuit ignored his argument that he had probable cause to arrest Gray for threatening her teacher. Pet. 2. Based on this alleged oversight, he argues that the Eleventh Circuit implicitly adopted the rule that handcuffing a student is unconstitutional *even if the officer has probable cause to make an arrest.* Pet. 5-8.

The court, however, never announced the rule that Bostic challenges. The court correctly noted that *T.L.O.* is an *exception* to the probable cause requirement, quoting *T.L.O.*'s holding that a search or seizure in a school setting "does not require *strict adherence* to the requirement that searches be based on probable cause." Pet. App. 10a (emphasis added) (citing *T.L.O.*, 469 U.S. at 341). Because *T.L.O.* established a lower burden for seizures in an educational setting, the court was correct to hold that "strict adherence" to the probable cause standard was not required. But in saying that probable cause was not *necessary* to justify the arrest, the court was not implicitly fashioning a rule that even an officer *with* probable cause to arrest a student—for example, an officer who witnesses a student openly selling drugs at school—cannot

constitutionally make the arrest. To the contrary, the court of appeals cited an earlier Eleventh Circuit case for the proposition that "*only arguable probable cause is required* to establish that an officer is entitled to qualified immunity." *Id.* (emphasis added) (citing *Durruthy v. Pastor*, 351 F.3d 1080, 1089 (11th Cir. 2003)).

Nor did the court ignore Bostic's contention that he had probable cause to arrest Gray. In a portion of the opinion not cited in Bostic's brief, the court examined and rejected his argument that Gray's conduct gave rise to probable cause to believe she committed the misdemeanor of harassment under Alabama law. Pet. App. 11a-12a, 22a n.7. The court noted that the criminal statute defining the crime of harassment prohibits a verbal threat only if "made with the intent to carry out the threat, that would cause a reasonable person who is the target of the threat to fear for his or her safety." *Id.* at 11a (citing Ala. Code § 13A-11-8(a)). The court acknowledged Gray's evidence—which, for purposes of summary judgment, it had to accept as true—that "neither Williams nor Horton feared for their safety." *Id.* It then cited Alabama cases addressing the crime of harassment and concluded that those cases involved conduct that was "generally more egregious" than the conduct at issue here and "involved a credible threat." *Id.* at 22a n.7. Thus, Bostic's contention that the court skipped over probable cause analysis is wrong.

Bostic relies for his reading of the Eleventh Circuit's decision on a single sentence of the opinion, where the court stated that, because *T.L.O.* requires something less than probable cause, it "need not reach the issue" of whether Bostic had probable cause to arrest Gray. *Id.* Although this statement, if read in isolation, could be somewhat ambiguous, Bostic's interpretation ignores the context in which the court made the statement. The bulk of the court's opinion focused on the key

question of whether Bostic's actions were constitutional under the *T.L.O.* standard, and the statement quoted by Bostic was made in a portion of the opinion analyzing whether Bostic's actions satisfied the first prong of the *T.L.O.* test. *Id.* at 11a-12a. Thus, its statement that it need not reach the question of probable cause at that stage of the *T.L.O.* analysis merely reflected its recognition that Bostic was not required to satisfy the relatively high probable cause standard because he could take advantage of the less strict reasonableness test under *T.L.O.* Bostic's interpretation of the court's opinion attempts to turn a statement of law *favorable* to him into reversible error.

The Eleventh Circuit's opinion properly applied this Court's Fourth Amendment jurisprudence to the facts of the case. Although Bostic may believe that the court came to the wrong conclusion, the question whether a court of appeals erred in evaluating the facts under the proper legal standard is not the type of question that this Court entertains absent extraordinary circumstances. *See* S. Ct. Rule 10 (review rarely granted where claimed error is the misapplication of a properly stated rule of law). The determination of probable cause is an individualized and fact-specific inquiry, *Wong Sun v. United States*, 371 U.S. 471, 479 (1963), as is the determination of reasonableness under *T.L.O.* Here, the Eleventh Circuit emphasized the narrowness of its holding, noting that it did not hold "that the use of handcuffs during an investigatory stop of a nine-year-old child is always unreasonable, but just unreasonable under the particular facts of this case." *Id.* at 16a. The panel's factbound application of the law does not warrant review by this Court. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("[W]e do not grant a certiorari to review evidence and discuss specific facts.").

Moreover, the probable cause issue in this case turns not on the proper legal standard as a matter of federal constitutional

law, which is well established and not in dispute here, but on an analysis of whether Gray's actions arguably violated Alabama's criminal statutes. *See Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979) ("Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law."). Thus, although the question of probable cause is technically a federal issue, "[f]ederal law asks only whether the officers had probable cause to believe that the predicate offense, as the state has defined it, has been committed." *Williams v. Jaglowski*, 269 F.3d 778, 782 (7th Cir. 2001). When, as here, the scope of a federal right depends on issues of state law, this Court traditionally defers to the expertise of the district courts and courts of appeals over the state laws within their jurisdiction. *See, e.g., Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998); *see also Bishop v. Wood*, 426 U.S. 341, 346 & n.10 (1976) (collecting cases). Thus, this Court generally does not grant certiorari to decide whether a court of appeals correctly decided an issue of state law. *See Butner v. United States*, 440 U.S. 48, 51, 57-58 (1979).

Even if Bostic were correct that the court did not address his probable cause argument, it would indicate only, as Bostic's brief suggests, "that the Eleventh Circuit quickly determined an absence of probable cause or arguable probable cause and, simply saved all parties time by moving directly to *T.L.O.*" Pet. 7. Indeed, if the court had found merit in Bostic's probable cause assertions, it would have had no reason to reach the *T.L.O.* test in the first place. But, when reasonable suspicion is the key issue in the case, the courts of appeals—including the only school seizure case cited by Bostic—frequently do not engage in explicit discussion of probable cause. *See, e.g., Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006); *Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141 (3d Cir. 2005); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598

(6th Cir. 2005); *Wofford v. Evans*, 390 F.3d 318 (4th Cir. 2004); *Shade v. City of Farmington*, 309 F.3d 1054 (8th Cir. 2002); *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000); *Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993). A court of appeals' refusal to discuss an unsupported argument is not error, *Flanigan's Enters., Inc. of Ga. v. Fulton County*, 242 F.3d 976, 987 n.16 (11th Cir. 2001), let alone one sufficient to justify this Court's intervention.

B. Remanding This Case to the Eleventh Circuit Would Serve No Purpose Because That Court Has Already Decided the Only Issues That Would Be Relevant on Remand.

Even assuming that the portions of the Eleventh Circuit's opinion Bostic singles out, read in isolation, are incorrect statements of law, it would not justify sending the case back to the Eleventh Circuit. Regardless of whether the court below technically left open the question of probable cause, there is no question as to what result it would reach on remand given its view of the facts and relevant state law. A remand under these circumstances would serve no useful purpose.

Bostic apparently believes that a nine-year-old's statement that she would hit her teacher is self-evidently illegal. Gray, however, was never charged with a crime, and the petition nowhere indicates which law Gray was supposed to have violated. Pet. 9. Bostic's briefs in the Eleventh Circuit were no more clear on this point—although he argued that committing a crime in the presence of a police officer creates probable cause for an arrest, he provided only cursory citations to the criminal statutes he believed Gray violated with no supporting analysis or case law. Bostic never quoted the relevant portions of the cited criminal statutes, set forth the elements of those crimes, or explained how Gray's actions supposedly implicated them.

These failures are not surprising, given that even a casual reading of the criminal laws on which Bostic relied demonstrates the absurdity of the assertion that Gray, an unarmed and harmless child, committed a crime under these circumstances. As the Eleventh Circuit noted, the crime of harassment under Alabama law covers only threats that would cause a reasonable person who is the target of the threat to fear for his or her safety. Pet. App. 11a. Here, the Eleventh Circuit held, for the reasons already discussed, that Gray "did not pose a threat to anyone's safety." *Id.* at 13a.

Although Bostic provided no citations to relevant case law in his brief, the Eleventh Circuit independently examined Alabama harassment cases in determining whether Gray's conduct may have given rise to probable cause. *Id.* at 22 n.7. For example, the court relied on *Fallin v. City of Huntsville*, 865 So. 2d 473 (Ala. Crim. App. 2003), in which the Alabama court found that a parent of a student committed harassment when the parent, a "large man," approached a cheerleading coach while yelling at her, waiving his arms, and pointing his finger. *Id.* at 477. In *Fallin*, the coach testified that she was "afraid for [her] safety," that she and the cheerleaders began retreating, and that she thought she might have to "defend [her]self." *Id.* She further testified that during the confrontation she was "visibly shaking . . . [a]nd [that she] was terrified." *Id.* The Eleventh Circuit in this case reasonably concluded that the conduct in *Fallin* was "generally more egregious" than the conduct at issue here. Pet. App. 22a n.7.[1]

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[1] The Eleventh Circuit also cited *B.B. v. State*, 863 So. 2d 132, 135-36 (Ala. Crim. App. 2003), in which the Alabama court found harassment based on a seventh grader's threat, uttered through clenched teeth, to kill his teacher. In addition to the threat, the

(continued...)

Aside from the crime of harassment, Bostic also relied on the Alabama statutes prohibiting disorderly conduct, Ala. Code § 13A-11-7, and "terrorist threats," § 13A-10-15. As with the crime of harassment, Bostic provided no case authority or analysis explaining how these statutes were supposed to apply to Gray's conduct. The crime of disorderly conduct, however, has similar elements to the crime of harassment and is inapplicable to Gray's conduct for the same reasons. *See* Ala. Code § 13A-11-7. The crime of "terrorist threats," a felony, is even more facially inapplicable. That statute is violated when a "person . . . threatens by any means to commit any crime of violence or to damage any property" by either "[t]errorizing another person" or "[c]ausing the disruption of school activities." Ala. Code § 13A-10-15. Gray neither "terroriz[ed]" anyone nor caused the disruption of school, and no reasonable police officer could believe that an anti-terrorism statute could

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[1](...continued)
student threw a desk across the room while saying, "I hate that teacher, I hate that teacher," and the teacher and a witness both testified that they feared the student would physically hurt someone. *Id.* In finding that the student's actions gave rise to charges of harassment, the court in *B.B.* relied on cases from other states where students had made genuine and believable threats of harm. *People ex rel J.P.L.*, 49 P.3d 1209, 1211 (Colo. Ct. App. 2002) (student said he had a list of students he was going to kill, pointed out specific people in the lunchroom whom he would target, and continued making threats even after told he was frightening other students); *State v. E.J.Y.*, 55 P.3d 673, 675 (Wash. Ct. App. 2002) (student threatened to "go get my gun and do like Columbine" along with other references to "Columbine" and "shooting," and teachers testified that they were afraid). These cases do not stand for the proposition that *every* threat by a child—no matter how harmless—is a crime.

be applied to the stray comment of a nine-year-old elementary school student.

Because the Eleventh Circuit repeatedly emphasized that Gray "did not pose a threat to anyone's safety," it has already decided the only issue that would be relevant on remand. Indeed, it defies reason that any court would hold that a nine-year-old's comment to her gym teacher—viewed in the light most favorable to her for summary judgment purposes—is a crime for which she can be arrested. To hold otherwise would be to criminalize a wide range of common statements made by children, whether in play or in anger, that cause no harm and pose no threat to anybody. No purpose would be served by remanding to the Eleventh Circuit for it to inevitably reach the same result.

II. The Eleventh Circuit Did Not Improperly Rely on Petitioner's Subjective Motives.

Bostic next argues that the Eleventh Circuit incorrectly relied on the fact that he intended to "punish" Gray by handcuffing her in support of its determination that the scope of the seizure was unreasonable. Pet. 8-11. Bostic claims the court's analysis is contrary to several of this Court's cases, including *Whren v. United States*, 517 U.S. 806 (1996). *Id.* Again, however, the court did not make the error that Bostic accuses it of making.

In analyzing the reasonableness of the seizure, the court correctly quoted *T.L.O.* to establish the relevant question: "whether Deputy Bostic's . . . handcuffing of Gray 'was reasonably related to the scope of the circumstances which justified the interference in the first place.'" Pet. App. 12a (quoting *T.L.O.*, 469 U.S. at 341). As the court noted, "[a] seizure will be permissible in its scope when the measures adopted are reasonably related to the objectives of the [seizure]

and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* Nowhere in the standard articulated by the Eleventh Circuit did the court state that an officer's subjective motives are a relevant consideration.

Nor did the court rely on Bostic's subjective motives in its application of the test to the facts of this case. Rather, the court explicitly relied on Gray's age and the lack of any realistic physical threat in holding that Bostic was not justified in handcuffing Gray. *Id.* at 12a-13a. As the court noted, Gray promptly complied with all her teachers' instructions and made no threatening gestures. *Id.* at 13a. Both coaches Williams and Horton testified that they had no fear for their safety, and Horton testified that Gray was physically incapable of harming anyone. *Id.* Moreover, at the time Bostic became involved, Williams had already turned his attention back to the class, and Horton had told Bostic that she could handle the situation. *Id.* at 5a-6a. There were thus no objective circumstances that would have led Bostic to believe that Gray had the intent or capacity to harm her gym coach physically or that a reasonable person would have been afraid. According to the court, "[t]he problem in this case for Deputy Bostic is that, at the time Deputy Bostic handcuffed Gray, there was no indication of a potential threat to anyone's safety." *Id.* at 12a-13a.

Near the end of its discussion of the second *T.L.O.* prong, the court noted that Bostic did "not even claim that he handcuffed Gray to protect his or anyone's safety" and, in fact, "candidly admitted that he handcuffed Gray to persuade her to get rid of her disrespectful attitude and to impress upon her the serious nature of committing crimes." *Id.* at 13a. In making this statement, however, the court was not relying on Bostic's subjective intentions to hold his actions unconstitutional; it was merely noting that, in addition to all the other evidence that Gray was not a realistic safety threat, Bostic himself *admitted*

she was not a threat. Bostic's admission established that even he did not have a reasonable argument that handcuffing Gray was justified because she committed a crime or to protect her teacher's safety. The Eleventh Circuit therefore did not commit any error.

CONCLUSION

The petition for a writ of certiorari should be denied.

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April 2007

Supreme Court, U.S.
FILED
APR 27 2007
OFFICE OF THE CLERK

No. 06-895

IN THE

Supreme Court of the United States

ANTONIO BOSTIC, individually and in his official capacity as Deputy Sheriff for Tuscaloosa County, AL,
Petitioner

v.

LAQUARIUS GRAY, a minor, by and through her mother and next friend, Toniko L. Alexander

ONPETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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STATUTES

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I. RESPONDENT'S OPPOSITION FAILS TO PROVIDE ANY REASON WHY CERTIORARI SHOULD NOT BE GRANTED BY THIS COURT

A. The *New Jersey v. TLO* two-prong test of "reasonableness" to the seizure of a public school student should not be substituted for the normal, required probable cause analysis of Fourth Amendment seizures by law enforcement officers.

Respondent's Opposition attempts to justify the Eleventh Circuit's improper application of this Court's ruling in *New Jersey v. TLO*, 469 U.S. 325 (1985) to the facts of this case. In *TLO* this Court held that absent probable cause, a school official's search of a student's purse was justified if a two-prong reasonableness analysis was satisfied. In the case at bar, the Eleventh Circuit never considered whether Petitioner Bostic had probable cause or arguable probable cause to seize Respondent. Instead, the lower court began the analysis with the two-prong "reasonableness" test announced in *TLO* simply because the seizure took place in a "school setting". Despite Respondent's claim that the Eleventh Circuit "easily disposed" of the probable cause issue, by that court's own admission, they never reached such an analysis. See, *Gray ex rel Alexander v. Bostic*, 458 F.3d 1295, fn. 7 (11th Cir. 2006)("However, because *TLO* does not require probable cause in a school setting, we need not reach the issue of whether Deputy Bostic had probable cause or arguable probable cause."). Respondent's contention that the Eleventh Circuit did not ignore the issue of

probable cause is not accurate. The lower court believed there was no need to "reach" that issue and, did ignore Petitioner's argument that he had probable cause to arrest Respondent which would make his seizure of her constitutional under the Fourth Amendment.

Under any reading, the Eleventh Circuit's decision views this Court's holding in *TLO* as the standard to be applied when any government actor, including a non-school official, makes a search or a seizure in a "school setting". However, such a rule of law is inconsistent with the holdings of this Court when dealing with seizures by law enforcement officers under the Fourth Amendment that occur outside of public schools.

If the Eleventh Circuit's decision is allowed to stand then the result will be two different standards of analysis for law enforcement conduct under the Fourth Amendment, one for conduct occurring inside a school setting and one for everywhere else. If the Fourth Amendment violation is alleged to have occurred in a school, probable cause to arrest the seized party will play no role in determining its constitutionality, at least in the Eleventh Circuit. Yet, if the same circumstances arise anywhere else- for example a public park or a grocery store -the existence of probable cause or arguable probable cause would constitutionalize the very same conduct which was unconstitutional inside the walls of an educational institution. See, *Davenpeck v. Alford*, 543 U.S. 146 (2004). Such an outcome could not have been intended by this Court and, the vastly different functions and authorities of the government actors in *TLO* and this case best illustrate this distinction.

The authority of a school official ends at the

edge of the school house lawn or, the end of a school-sponsored function. In *TLO* the assistant vice principal of the New Jersey school lacked the authority to search the purse of a student anywhere other than on the school premises or at a school-sponsored event. However, Deputy Bostic, as a law enforcement officer of the State of Alabama has the authority to seize anyone who commits a crime, even a non-violent misdemeanor, in his presence anywhere within the State. See, e.g. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); see also, *Ala. Code §15-10-3*. Therefore, the seizure of Respondent need not be determined under the two-prong "reasonableness" test announced in *TLO* for "school settings" as the Eleventh Circuit held. Put another way, the *TLO* test for Fourth Amendment searches by school officials certainly would not apply if Respondent had threatened to physically assault Coach Greer Williams in the presence of Petitioner Deputy Bostic at a public park somewhere in Tuscaloosa County, Alabama. Instead, a court would look to the holdings of this Court, such as those in *Beck v. Ohio*, 379 U.S. 89 (1964), *Atwater v. City of Lago Vista*, supra, and *Davenpeck v. Alford*, supra, wherein Justice Scalia wrote "In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." Neither the common law nor this Court have ever assigned a different standard for law officers who make seizures in our public schools. Under *Davenpeck*, Petitioner's seizure of Respondent cannot be unconstitutional, even if it did occur in a "school setting".

Even if a second analysis, not involving a determination of the existence of probable cause,

applies to law enforcement officers who have been assigned to our public schools and, in fact, the *TLO* "reasonableness" test is such a second analysis, this Court has held that reasonableness is measured in objective terms. *Florida v. Jimeno*, 500 U.S. 249 (1941). Furthermore, this Court wrote in *Whren v. United States*, 517 U.S. 806 (1996), "Not only have we never held .... that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary." Therefore, Respondent is incorrect in her assertion that the Eleventh Circuit did not improperly rely on Petitioner's subjective motivations and that it would be pointless to reverse the Eleventh Circuit's ruling on this basis.

In the absence of any factually similar case law clearly establishing Petitioner's conduct to violate the Constitution, the Eleventh Circuit held that under the "obvious clarity" standard set out in *United States v. Lanier*, 520 U.S. 259 (1997) "every reasonable officer would have known that handcuffing a compliant nine-year-old child for purely punitive purposes is unreasonable." *Bostic*, supra (emphasis added). Under this rule of law handcuffing a compliant nine-year-old child to effectuate an arrest would be *reasonable*. Consequently, Respondent's contention that "nowhere in the standard articulated by the Eleventh Circuit did the court state that an officer's subjective motives are a relevant consideration", Opp. 12, is incorrect. Obviously, the lower court analyzed the subjective motivations of Petitioner and found them to be punitive. And, if his motivations were not punitive then, as the Eleventh Circuit stated, he would not have been on "fair warning" that his conduct obviously violated the Constitution. Therefore, Petitioner's

subjective desire to "punish" Respondent makes his conduct under the Fourth Amendment "unreasonable", a rule this Court has "repeatedly held and asserted the contrary" of. *Whren*, supra.

The consideration of Petitioner's subjective motivations by the Eleventh Circuit differs drastically from Justice Scalia's instruction in *Davenpeck* which states, "The Fourth Amendment's concern with reasonableness allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." If Petitioner had probable cause to arrest Respondent then, her seizure cannot be unlawful espite a determination that his subjective motivation was to punish her. After all, "Evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." *Id.*

B. Law Enforcement Officers Stationed in Our Public Schools Nationwide will be Forced to Take Greater Caution in their Duties to Enforce the Criminal Laws of their States and Apprehend those Threatening to violate those Laws, even in "School Settings", if the Eleventh Circuit's Decision is allowed to Stand.

Since the Eleventh Circuit's ruling in this case on August 7, 2006 there have been 6 deadly shootings in our public schools here in the United States, including the deadliest shooting in American history at a public university in Virginia. From Essex, Vermont to Bailey,

Colorado to Cazenovia, Wisconsin to Nickel Mines, Pennsylvannia to Tacoma, Washington to Blacksburg, Virginia our nation's law enforcement officers have been assigned to protect our educational institutions, many times, after a tragedy has occurred. School violence in the United States has affected hundreds of local communities necessitating a presence of law enforcement officers in our nation's institutions of learning. Since the massacre at Blacksburg, President Bush has asked Health and Human Services Secretary Mike Leavitt, Education Secretary Margaret Spellings and Attorney General Alberto Gonzales to meet with officials in at least seven states where previous acts of horrific school violence has occurred. *WDBJ Channel 7, Roanoke News, Associated Press copyright 2007.* Now, communities are taking action by asking law enforcement officers to protect their children and, instead of qualified immunity protecting those officers, it is being stripped and eroded under the guise of a new standard that applies only to "school settings". Our nation's law enforcement officers, now more than ever, need this Court to clarify once and for all, the analysis of their seizures of persons suspected of committing crimes in our public schools.

The Eleventh Circuit's decision, holding that the existence of probable cause need not be determined when a seizure occurs in a "school setting" if the subjective motivations of a law enforcement officer are unreasonable, threatens to have a dangerous chilling effect on law officers stationed in our children's schools. For the thousands of law officers stationed in public schools across the United States, inaction, for fear of civil liability, will prevail over action, for fear of our children's safety. Clearly, the intent of this Court in *TLO* and in *Terry v. Ohio*, 392 U.S. 1 (1968) was to

expand the circumstances in which a law officer's Fourth Amendment seizure would be protected, or in the case of *TLO*, a school-official's conduct. After such cases, the simple absence of probable cause did not always render a seizure unconstitutional. Instead, protection was still afforded government actors, especially law enforcement officers, if their conduct was objectively reasonable. The Eleventh Circuit applies, in the reverse, the order of analysis a court should follow when deciding if conduct is constitutional. Instead of beginning with a determination of whether probable cause existed and, if not, proceeding to a determination of whether arguable probable cause existed and, if not,deciding whether conduct was objectively reasonable even without probable cause, the Eleventh Circuit begins with deciding the reasonableness of an officer's conduct under *TLO*. The mistake is compounded when it uses the "school setting" to justify the consideration of the Petitioner's subjective motivations.

In doing so, the lower court narrowed the protection for government conduct under the Fourth Amendment. And, perhaps, the most disturbing effect of the lower court's decision is that the narrowing of circumstances in which protection is afforded our law enforcement officers is in our children's schools. The place to encourage action against crime or *threatened* crime by law enforcement the most, our children's schools, is now the one place where protection from civil liability will be stripped if the officer's subjective motivations are perceived to be "punitive" and, therefore, "unreasonable".

Our law enforcement officers who protect our nation's schools should be encouraged to act upon threats of violence. Instead, the Eleventh Circuit has

fashioned a new analysis that effectively strips law enforcement officers of qualified immunity if it can be determined, even if only by a portion of one answer to one interrogatory, that their subjective motivations were "punitive". Refusing to determine the existence of probable cause and focusing on the subjective motivations of the seizing officer under the rationale that in a "school setting" this Court's mandates in *Davenpeck*,supra, *Graham v. Connor*, 490 U.S. 386 (1989), *Whren*, supra, and *Arkansas v. Sullivan*, 532 U.S. 769 (2001) are inapplicable cannot be the intended effect of this Court's decision in *TLO*.

CONCLUSION

For all of the foregoing reasons, Petitioner Bostic respectfully requests that this Court grant this Petition for Writ of Certiorari.

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